

Broward County Health Corporation d/b/a Sunrise Rehabilitation Hospital and 1115 Nursing Home Hospital and Service Employees Union-Florida H.E.R.E., AFL-CIO, a Division of 1115 District Council, Petitioner. Cases 12-RC-7598, 12-RC-7599, and 12-RC-7600

December 19, 1995

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS
BROWNING, COHEN, AND TRUESDALE

The National Labor Relations Board has considered objections to an election¹ held December 16, 1993, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Direction of Election. The tally of ballots in Case 12-RC-7598, shows 20 for and 43 against the Petitioner, with no challenged ballots; in Case 12-RC-7599, the tally shows 16 for and 43 against the Petitioner, with 3 challenged ballots; and, in Case 12-RC-7600, the tally shows 22 for and 72 against the Petitioner, with 2 challenged ballots. The challenges were insufficient to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings² and recommendations only to the extent consistent with this Decision and Direction of Second Election, and finds that the election as to all three units must be set aside and a new election held.

The Petitioner's Objection 11 alleges, inter alia, that the Employer offered to provide employees who were not scheduled to work on the day of the election 2 hours of pay to come to work to vote and that this constituted objectionable conduct sufficient to set aside the election. Relying on *Young Men's Christian Assn.*, 286 NLRB 1052 (1987), the hearing officer overruled this objection. We have carefully considered this issue and all the relevant precedent, and for the reasons stated below, we find that monetary payments that are offered to employees as a reward for coming to a Board

election and that exceed reimbursement for actual transportation expenses amount to a benefit that reasonably tends to influence the election outcome. Such an offer therefore constitutes objectionable conduct sufficient to warrant setting aside the election. We overrule *Young Men's Christian Assn.*, which reaches a contrary conclusion.

The facts are not in dispute. Several days before the election, the Employer distributed a handbill to most employees entitled "Important Information about the Union Election." The section of this handbill entitled, "Special Election Day Arrangements" states, in part:

Report pay of two (2) hours will be paid if you are not scheduled to work December 16 [the election date] and you come in for the election. It is not necessary for you to report to your supervisor or prove that you actually voted as long as you come in and properly record the time yourself.

In this section the Employer offered, in addition, to provide transportation to and from the facility on the day of the election and to provide child care at the Employer's facility during the hours the polls were open for employees not scheduled to work the day of the election. The handbill also ends with the Employer's exhortation: "WHEN YOU DO VOTE, WE HOPE THAT YOU WILL VOTE 'NO.'"³

In determining whether the Employer's offer of pay at issue is objectionable, we need not inquire into the subjective reactions of the potential recipients of the benefit. The standard is an objective one—whether the challenged conduct has a reasonable tendency to influence the election outcome.⁴ When the conduct takes the form of an employer's offer or grant of benefit, the Board is mindful of the "suggestion of the fist inside the velvet glove," i.e., that employees "are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."⁵ In evaluating the likely effect, the Board takes into account such factors as the size of the benefit in relation to its stated legitimate purpose, the number of employees receiving it, how the employees would reasonably construe the purpose given the context of the offer, and its timing.⁶

We find the offer of benefit in the present case clearly objectionable under that test. First, the benefit was substantial—2 hours' pay without the necessity of doing anything other than showing up at the Employer's facility on the day of the election. Furthermore,

¹ The Petitioner filed three petitions seeking to represent three separate units of employees: Case 12-RC-7598 seeks a registered nurses unit; Case 12-RC-7599 seeks a technical employees unit; and, Case 12-RC-7600 seeks a nonprofessional employees unit. The election in all of the units was held on December 16, 1993. The Petitioner timely filed identical objections in all three cases. Pursuant to an order consolidating cases, order directing hearing on objections and notice of hearing issued by the Acting Regional Director, a hearing was held on all objections on April 6 and 7, 1994.

² In adopting the hearing officer's recommendation to overrule Objection 1, we note that there is no evidence that Supervisor Rhoda Matlin's questioning of employee Deborah Burger was disseminated to any of the approximately 244 employees in the 3 separate units here. Accordingly, even assuming that the incident occurred, it was isolated, de minimis, and did not affect the election results. *Metz Metallurgical Corp.*, 270 NLRB 889 (1984).

³ There is no record evidence regarding the number of employees actually receiving the payments or the amounts of any such payments.

⁴ *Gulf States Cannerys*, 242 NLRB 1326 (1979).

⁵ *B & D Plastics*, 302 NLRB 245 (1991), quoting *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

⁶ *B & D Plastics*, supra.

this monetary payment was not linked in any way to transportation expenses but was in addition to the Employer's offer of election day transportation and child care services. Thus, the benefit is even more vulnerable to the objection raised by the dissent in *Young Men's Christian Assn.*, to the payment offer at issue in that case—that it was not properly construed as expense reimbursement, but rather as “something ‘extra’” for employees on election day.⁷ The Employer is therefore mistaken in placing reliance on Board precedent finding that a party's offer to voters of transportation to the polls is not objectionable.⁸

The second factor also militates in favor of a finding of objectionable conduct. The Employer has not disputed the hearing officer's finding that the flyer was “generally distributed to most employees.” Further, the number of employees potentially affected was more than de minimis. The offer was made to all employees—including “full-time, regular part-time and most per diem employees” who were not scheduled to work on election day. While the exact number of employees not scheduled for work on that day is not a matter of record, the flyer itself anticipates that there might be enough to warrant a fully staffed child care facility.

As to the third factor—how the employees might reasonably perceive the purpose of the offer—we note the context in which it was made. The election arrangements flyer in which the offer appeared ended with the admonition that employees would be “help[ing] to decide our future by casting your vote” and that it was the Employer's wish that they each “Vote ‘No.’” Given this message and the absence, noted above, of any link to transportation expenses, we find that employees would reasonably perceive the 2 hours' pay as a favor from the Employer which the employees might feel obligated to repay by voting against the Union, as the Employer requested.

The reasoning of Member Stephens' dissent in *Young Men's Christian Assn.*, is relevant here:

[Employees receiving such a monetary offer] would have to choose among three unsatisfying courses of action: (1) accepting the payment, voting for the Union, and feeling like an ingrate who bit the benefactor's hand; (2) voting against the Union so as to avoid any such feelings of guilt; and (3) foregoing the payments and following their initial inclinations in voting. For employees who had no strong inclination one way or [the]

other, the choice would be simpler; but the danger here . . . is that apathetic voters who would not otherwise be inclined to go to the polls “will more likely favor the party making a monetary offer.”

286 NLRB at 1054 (citation omitted). See also Chairman Miller's dissenting opinion in *Quick Shop Markets*, 200 NLRB 830, 831–832 (1972).

In sum, we find that the Employer's offer to pay employees 2 hours' pay to come in on election day constituted objectionable conduct. We overrule *Young Men's Christian Assn.* that holds to the contrary, and we set aside the election and direct a second election.⁹

[Direction of Second Election omitted from publication.]

MEMBER COHEN, dissenting.

My colleagues have overruled Board precedent, and they have done so without knowledge of relevant facts. I would ascertain the facts and then make a reasoned judgment as to whether it is necessary or desirable to overrule Board precedent. I therefore dissent.

In *Young Men's Christian Assn.*, 286 NLRB 1052 (1987) (*YMCA*), the Board permitted an employer's grant of 2 hours' payment to employees who would come to the facility to vote. The employees were not scheduled to be at work on the day of the election.

In the instant case, my colleagues reverse *YMCA* and condemn the conduct. They do so without knowledge of the number of employees who received the benefit. This is surprising inasmuch as my colleagues say that the Board should take into account “the size of the benefit in relation to its stated legitimate purpose [and] *the number of employees receiving it.*” (Emphasis added.) It is clear, from the quoted phrase, that the number of employees *receiving the benefit* is a relevant factor. As noted, the evidence on this point is missing. My colleagues then seek to avoid this problem of missing evidence. They say that the *offer* of the benefit is itself objectionable. However, we do not know the number of employees who would be eligible for such an offer, i.e., the number of employees who would not be scheduled to work during the election.¹ Finally, we do not know the amount of money paid or

⁷Chairman Gould would not rely on *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984), because he believes that the opinion in that case does not withstand scrutiny.

⁸This case is thus distinguishable from *Heintz Mfg. Co.*, 103 NLRB 768 (1953), and its progeny, which deem it not objectionable for a party to furnish transportation to bring voters to the polls, so long as the offer is available to all. We continue to adhere to that precedent.

⁹Our dissenting colleague has argued that we have overruled precedent without knowledge of the relevant facts and makes much of the dearth of evidence related to the number of employees who were eligible for and who actually received the payment and the actual amounts paid to such employees. Here, however, it is undisputed that the Employer's *offer* of election day payment was made to most employees, and our finding is that the *offer* of the payment is as objectionable as the actual payment because of its reasonable tendency to influence the election outcome. The specifics of the actual payments, therefore, need not be shown.

¹My colleagues seek to infer that the numbers were substantial. In my view, it is inappropriate to engage in guesswork in circumstances where the facts are quantifiable and easily obtained.

its relationship to regular weekly wages. This too is surprising inasmuch as my colleagues say that the Board should consider the "size of the benefit."

In sum, I would ascertain the relevant facts. After doing so, it may turn out that *YMCA* should be ap-

plied, distinguished, or perhaps overruled. What the Board should not do is reach out now and overrule Board precedent, without knowledge of the relevant facts.